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NO. 767

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

HAROLD L. ICKES,
SECRETARY OF THE INTERIOR, Petitioner,

versus

THE UNITED STATES OF AMERICA EX REL. CHESTATEE PYRITES & CHEMICAL CORPORATION, Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

BY
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March 15, 1933.

11816 STEIN PRINTING CO., ATLANTA, GA.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

THE SOLE ISSUE HERE PRESENTED.

The only legal question presented by the petition in this case is whether losses for interest on obligations incurre before November 11, 1918 can be compensated where the interest on such obligations accrued after March 2, 1919, or is there a legal cut-off on interest losses even though they arose out of binding contracts to pay interest made before the Armistice?

While this is the sole issue, petitioner does not, in our opinion, adequately advise this Court of the applicable facts necessary to be kept in mind in determining the issue.

THE ISSUE HERE INVOLVED HAS ALREADY BEEN DETERMINED BY THIS COURT.

In *Wilbur v. United States*, *284 U. S. 231, 237, 238*, speaking of "the amount of interest" which constituted an allowable item, this Court used the words "paid or incurred," and "paid on the obligation incurred." The Act of March 2, 1919 which the Court was construing (see Appendix to petition 15 ff.) gives the right to receive an award for "net losses" and such losses mean all net losses not specifically exempt by the statute and it is not contended by petitioner that losses for interest on obligations incurred are specifically excepted from the statute. The legal question here presented was before the Court in rendering its former decision herein and in the course of the opinion therein referring to interest *paid* or *incurred* the Court said such,

> "* * * constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended."

Obviously, respondent "suffered" a loss within the meaning of the Relief Act, as interpreted by this Court, and under the admitted facts when it incurred obligations to pay interest on the money it borrowed and lost.

THE STATUTES.

On October 5, 1918 (40 Stat. 1009, Appendix 1 hereto), the Congress authorized the President to take over certain mining properties including those producing pyrites, the mineral in which respondent is interested, and provided in Section 3 thereof that when the United States had taken over such mines, the Government should make "just compensation." The statute prescribed how just compensation should be determined and in case an agreement could not be reached, authorized a suit to recover on behalf of the owner of the mine. While that Act was pending before the Congress, the Secretary of the Interior and other officers requested

and demanded that mine owners, including respondent here, enlarge their respective enterprises.[1]

Because of the unexpected termination of the War, the Act of October 5, 1918 was not followed but the Congress passed a supplemental Act, that of March 2, 1919, in which the Secretary of the Interior was given power "to adjust,

---

[1]Petitioner's predecessor admitted that claimant, respondent here, "made claim for losses based on payment of interest, and obligations incurred to pay future interest, on borrowed money, used in complying with stimulation;" that it "had paid out money, and obligated itself to pay out money in the future, as interest on money borrowed to prosecute the production of pyrites;" that it "was stimulated by a former Secretary of the Interior to increase its production by enlarging its operations;" that the issue of law was—"Is interest paid and obligations to pay future interest for the use of money a loss?". Petitioner's predecessor found and himself set up his findings here and on a former appeal said:

"The amount of money required to meet the government demands was so great as to make the securing of it by ordinary means almost impossible. The activities of the government to induce Ashcraft and Wilkinson to finance claimant, so that war needs might be met quickly and in large measure, were personal, direct and effective. * * * Secretary Lane who himself had a part not only in the stimulation of claimant but, through suggestion, in the financing, recognized that Ashcraft and Wilkinson had performed a service to the government. * * * the record showed that the then Secretary of the Interior, realizing no doubt that this property presented opportunity for the biggest production of pyrites in the entire country, used every means in his power to persuade the claimant to develope it. It is true that he could not and did not guarantee claimant against loss, but his full influence short of underwriting the project was exerted. Always, too, there was a realization that claimant, in responding to government request, will suffer great financial loss, notwithstanding the generous provisions of the War Minerals Relief Act." (R. 11–24).

liquidate and pay such net losses" as were suffered. In the Act of 1919, the original appropriation of $50,000,000.00 carried in the Act of 1918 was reduced to $8,500,000.00.

Congress being dissatisfied with the "interpretation and application" of the Acts of 1918 and 1919, passed the Act of November 23, 1921. This Act authorized the granting of rehearings by the Secretary and contained the mandatory provision that claimants "shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation of said Act." The Act of February 13, 1929 authorizes this suit. (For Acts of 1919, 1921 and 1929 see Appendix to petition herein).

PETITIONER'S ANSWER BELOW AND THE PETITION HEREIN FAIL ADEQUATELY TO ADVISE THIS COURT OF THE TRUE FACTS.

At page 3 of the petition herein, discussing the opinion of this Court on a former appeal, the petition says:

> "There is nothing in the court's opinion to indicate that it considered the question of claimant's right to recover interest paid or accruing after March 2, 1919."

At page 4 of the petition, a quotation is made from *Work v. United States, 298 Fed. 839.* This quotation omits a material part of the decision that at page 842 where the Court said:

> "Being, therefore, an element of the expenses incurred, we think that in equity and justice the interest paid or *obligated to be paid* in this case should be allowed." (Emphasis supplied)

This opinion in 298 Fed. 839 was followed by the Court of Appeals in *Chestatee v. Wilbur, 47 Fed. (2d) 424* where it was stated:

> "The sole question presented is whether interest paid or *agreed to be paid* by the relator on borrowed money expended in producing or preparing to produce pyrites constitutes a loss which, by the terms of that Act, the Secretary should recognize and pay."

At other places in the petition statements are made to the effect that the issue here has not heretofore been specifically dealt with. These contentions and the fact that petitioner relies upon the findings of the trial judge in this case, make it necessary for respondent to present adequately and truthfully facts of record not disclosed in the petition herein.

Petitioner's answer in the trial court not only was not "prepared with purpose to disclose to the Court all relevant facts and circumstances," but was shown of record to be untrue. The petition here fails "adequately to advise (this Court) concerning the real situation."

That the issue here now presented, which has heretofore been fully considered both by the Department of the Interior and the Courts, may be fairly stated, respondent is under the necessity of stating in detail facts which the Court needs to know in order properly to decide such issue. This history shows, and the fact is, that the specific contention was made that obligations incurred was on the same legal basis as obligations paid, and it also shows that petitioner, prior to this particular proceeding, had never contended that there was any shut-off day.

DEPARTMENTAL AND JUDICIAL HISTORY OF THIS CLAIM.

A. The Departmental History.

Respondent here, on March 5, 1919, filed its claim in the Department of the Interior, seeking an award of net losses (R. 3, admitted R. 27). This was the first claim filed and on June 5, 1919, a small award was made which on August 8, 1919, was increased and on October 15, 1919, further increased (R. 9–11).

Congress, on November 23, 1921, passed an act amending the act of March 2, 1919. Under this amended act, further hearings were had before the Secretary of the Interior and his Assistant Commissioner and that Commissioner, on September 22, 1922, recommended an additional award of $469,784.62 (R. 11–24). This recommendation was adopted (R. 25).

In the opinion of Mr. Briar, the Assistant Commissioner, on which the award was made, he said:

"All interest charges have been deducted"

and he proceeded thence to argue as a legal issue why no interest charges should be paid (R. 13–15).

In December of 1927, the Secretary of the Interior requested an opinion from the Attorney General on two questions, the second of which reads:

> "Second. Are you authorized to adjust, liquidate and pay net losses arising by reason of interest paid, or *payable under obligations to pay*, on money borrowed for use by operators in connection with operations under the law?" (Emphasis supplied.)

The Honorable The Attorney General gave an opinion on March 23, 1928, without expressing definitely his views as to the law; but, because of the consistently-adhered-to policy of the Department of the Interior and of the grave question of one Secretary overruling a predecessor, advised the Department of the Interior not to pay "interest paid or *payable under obligations to pay*" without further legislation (35 Op. A. G. 426, 430, Emphasis Supplied).

Eight days after the decision of this Court, petitioner's counsel prepared a decree, which was somewhat modified by respondent's counsel, (R. 40, decree printed R. 35, 36), in which it was decreed that the petitioner should "forthwith proceed to ascertain the amount of interest that at the time of the passage of the Act of Congress of March 2, 1919, had been paid or *the obligation incurred* by relator (respondent here) for money borrowed and lost * * *" (Emphasis supplied). Upon the service of that decree, petitioner sent out a new questionnaire asking certain questions, among which were questions 23 and 24, the first being a request to state the "amount of your claim for interest actually paid;" the second being "What is the amount of your claim for *interest still to be paid?*" (R. 40, Emphasis supplied).

Thereafter, the Department of the Interior asked for opinions from its Solicitor, whose opinion is dated February 3, 1932

(R. 52), and from the Attorney General, whose opinion is dated April 2, 1932 (R. 57).

On March 16, 1932, the Secretary made another award to respondent in the sum of $44,451.45 for interest *accrued* to March 2, 1919, this being without "prejudice" (R. 85). This ends the activities of the petitioner in this case except as to the answer filed herein on April 27, 1932, and which will be discussed under the Judicial History (R. 45 ff.), as will also be the testimony of the Assistant Secretary (R. 82 ff.)

B. The Judicial History.

After the Act of 1921 and after further awards had been made to respondent and others, respondent sought a determination of the question here involved and in 1923 filed a suit in the Supreme Court of the District of Columbia seeking a writ of mandamus under allegations similar to those in this case. In that case, the Supreme Court of the District, on January 9, 1924, held that the writ should be granted and cited in support of its opinion *Seaboard Air Line R. Co. v. United States, 261 U. S. 299* and *United States v. State of New York, 160 U. S. 598.*

After the decision of the Supreme Court of the District which was affirmed by the Court of Appeals of the District, Congress on June 7, 1924, while those decisions remained unreversed, passed the act of that date restoring the appropriation of $50,000,000.00. This case finally reached this Court and it was held that as the law then stood, the Secretary of the Interior had an uncontrolled discretion and the case was ordered dismissed for lack of jurisdiction. The Supreme Court, in dicta and without giving consideration to the act of October 5, 1918, referred to "a gratuity" (*Work v. Chestatee Co., 267 U. S. 185*).

After this decision of the Supreme Court, Congress specifically granted jurisdiction to the courts (Act of February 13, 1929. For a history of the legislation see Appendix to brief for respondent in *Docket No. 67, October Term 1931, Wilbur v. U. S. ex rel. Chestatee Pyrites & Chemical Corporation,* later reported in 284 U. S. 237).

Congress having recognized respondent's rights, by this act removed any argument of a gratuity and specifically authorized the courts to grant relief for errors of law. Following that statute, this suit was filed on the 18th of February, 1929, in which it was alleged that respondent "claimed interest paid by it and due to be paid by it" (R. 3); that other amounts of interest "have since accrued and are yet accruing" (R. 4); that it was obligated "to pay further interest" (R. 5); and it prayed that the court direct the Secretary to make an award for what is "due for interest paid on borrowed money and for obligations to pay interest thereon" (R. 6).

In answer to this petition, petitioner set up the findings of his Assistant Commissioner hereinbefore referred to, admitted that respondent had paid interest and obligated itself to pay money in the future (R. 28); said that one of the questions of law was:

> "(1) Is interest paid and *obligations to pay future interest* for the use of money a loss?" (R. 30, Emphasis supplied);

denied that respondent had suffered loss because of having paid interest and obligated itself to pay other interest.

This case was thereafter heard, appealed to the Court of Appeals and reached this Court where it was held (*284 U. S. 237*) that respondent was entitled to a writ of mandamus. Petitioner's counsel then drew a decree which was entered on December 15, 1931 (R. 35, 40), and after that decree had been entered, petitioner having failed to comply fully therewith, this petition was brought to enforce the decree. The word "decree" was used in the record although the case is not an equity case but because the Act of February 13, 1929, makes "decree" and "judgment" synonymous.

In the petition to enforce the decree (R. 36 ff.), the history of the litigation is in part pleaded and it there definitely appears that respondent claimed not only interest that it had paid but interest that it was to pay in the future; that this claim was recognized and indeed, that petitioner, in seeking the former writ of certiorari, had, as one of the grounds to show public interest, stated to this Court:

"The amount claimed for interest would be increased and possibly more than doubled if computed to the date of settlement of the claim" (petition for writ of certiorari in the former case, p. 11).

The record in this case (pp. 37–40 inclusive) shows definitely that the issue included: (a) interest paid; and (b) future interest obligated to be paid. So definitely does this issue appear that the learned Attorney General with colloquial forcefulness said in his opinion that "it stuck out like a sore thumb" (R. 61).

Respondent's counsel did not then believe and do not now believe that there is any difference in the legal obligation as to the interest paid and the obligations to pay further interest. Apparently petitioner's counsel agreed with respondent's contention and the issue was treated as one and not as two. Either petitioner's counsel then saw no legal distinction between interest paid and interest to be paid or he failed adequately to inform the court of his contentions. No one argued that there was any difference in law as to the subdivisions. The sole argument made by the petitioner at that time and at all times prior to the filing of his answer herein, was that no interest paid or obligated to be paid could be recovered. The argument of respondent's counsel was that all interest, that paid and that obligated to be paid, could be recovered. The word "obligations" is in the statute and was used in the opinion of this Court, in the decree of the lower court of December 15, 1932, and throughout the pleadings. The Secretary seemed to agree with his counsel and with the approval of his counsel sought to obtain information both as to interest paid and as to interest still to be paid (R. 40).

The Solicitor of the Department of the Interior and the Attorney General, by their respective opinions (R. 52–65), concluded that interest to be paid must stop on March 2, 1919. These learned attorneys arrived at their conclusions by different roads but each advised petitioner that no interest for obligations incurred during the war period and not *accrued* on or before March 2, 1919, could be paid.

In a disingenuous effort to avoid the legal issue, and on April 27, 1932 (R. 45 ff.) petitioner filed an answer setting up

arguments and claiming that the legal issue here presented was not a legal but a fact issue. That answer was immediately traversed and to establish the truth of the traverse, the Assistant Secretary who had signed the answer (R. 52) was placed upon the stand by respondent and categorically denied all the substantial allegations of the answer (R. 82–85). The answer claimed that consideration had been given to all interest due regardless of any cut-off. The witness testified: "I did not consider any interest beyond March 2, 1919" (R. 83); and further, the witness said that he had dealt with the question solely as a matter of law, made a payment without prejudice and while awaiting the decision of the Attorney General (R. 84, 85).

The answer had claimed that the Secretary was never served with the writ of mandamus under the decree of December 15, 1931. The witness testified: "On December 15, 1931, the Secretary received the decree of the court and proceeded to carry out its mandate" (R. 85). Further, a leading attorney of the District of Columbia, Mr. Josephus C. Trimble, testified that the Solicitor of the Department of the Interior had said: "The Department would act upon a certified copy of the decree and that it was unnecessary for the plaintiff to go to the expense of securing and serving a formal writ of mandamus" (R. 86). The Secretary himself wrote the President of the Senate:

> "On December 15, 1931, the Secretary received *the decree of the court* and proceeded to carry out its mandate" (R. 85, Emphasis supplied).

The Court of Appeals in this case disregarded this amended plea and no doubt the learned Solicitor General was embarrassed thereby and so there is now presented to this Court the one question of law which is whether or not there is a cut-off as of March 2, 1919, of all obligations to pay interest.

This Court in a related case (*Wilbur v. United States, decided December 6, 1932, 77 L.ed., Adv. Op. 379*) had before it a similar record to the one here and said of petitioner's answers there:

> "* it seems proper to add that if these answers had been more carefully prepared, with purpose to disclose to the Court all relevant facts and circumstances, unnecessary difficulties would have been avoided."

Reference was there made to the petition for certiorari by saying:

> "The petition here for certiorari does not mention the conflicting view in respect of the Exhibits or deal with them as parts of the record. It failed adequately to advise us concerning the real situation."

The decision of this Court and the decree of the trial court were disregarded by petitioner.

In *Wilbur v. United States, 284 U. S. 237*, this Court, as stated above, decided that interest paid and obligations to pay interest was an allowable item. The mandate of this Court was followed by the Supreme Court of the District ordering the Secretary "forthwith to proceed to ascertain the amount of interest that, at the time of the passage of the act of Congress of March 2, 1919, Chapter 94, had been paid or the obligation incurred."

The Secretary complied with this order to the extent only that interest had been "paid" before March 2, 1919, wholly refusing to pay the interest for which "obligations" had been incurred. Petition was then filed to enforce the decree or judgment entered in accordance with the mandate of this Court. The trial court in this petition erroneously followed the response of petitioner notwithstanding such response was disproved by the officer who signed it. On appeal, to the Court of Appeals, as here, the disproved pleadings of the Secretary were abandoned by his counsel and following the decision of this Court the legal issue was decided in respondent's favor.

THE TRIAL COURT'S OPINION.

Petitioner refers to the opinion of the trial judge who seemed to think, misled probably by the untruthful answer of the Department of the Interior, that the case of *West v. Hitchcock, 205 U. S. 80*, was applicable. That case has no application. The rule here applicable is that stated in *Ex Parte Newman, 14 Wall. 152, 156* and *United States v. Fisher, 222 U. S. 204*. The trial court could not accept an answer by way of avoidance when the allegations in the answer were testified to be untrue by the officer who signed such answer.

ARGUMENT.

This Court, when this case was here the second time (*284 U. S. 231, 237*), cited and relied upon the Act of October 5, 1918 which authorizes a recovery by respondent here of just compensation for its losses and said:

> "The amount of interest that at the time of the passage of the Relief Act March 2, 1919, had been paid or incurred by relator for money borrowed and lost in producing and preparing to produce pyrites upon the specified conditions is to be taken into account in determining the amount of its net loss as of that date. It constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended. *United States v. New Uork, 160 U. S. 598, 621–624.*"

Seemingly the use of the date March 2, 1919 in the above quotation is the basis of the argument of petitioner here. It is argued on behalf of the Department of the Interior that by the use of this date this Court intended to limit obligations *incurred* to those that had *accrued* on or before March 2, 1919. The Act of 1919 does not limit the right to recover to the losses that had actually been paid but included losses that might thereafter be paid on obligations incurred prior to November 11th and when this Court, in the quotation above, used the words "specified conditions" in referring to the Act of March 2, 1919, it merely wrote into the opinion the conditions of that Act and did not, of course, extend the time in which obligations could be incurred to March 2, 1919, nor did it limit to that date the time that obligations incurred might accrue. There is nothing in the decision of this Court that prevents a recovery of obligations incurred within the specified conditions of the statute.

The date the interest losses *accrued* is immaterial so long as the losses are the *result* of *obligations incurred* during the stimulation period.

In the opinion of this Court and following the quotation above, there is set out some of the "specified conditions" which must exist before interest paid or obligations incurred to pay interest are allowable items. These conditions, this record shows, were fully met by respondent.

The particular obligations incurred in this case and which obligations bore interest and which obligations were not all due March 2, 1919, were obligations incurred under the direct stimulation and influence of the Secretary of the Interior. So the particular obligations on which the interest here sought to be recovered arose, meet every condition stated by this Court on the second appeal of this case.

Petitioner refers to the statement that when the Government undertook to make just compensation through the terms of the Act of March 2, 1919, it was granting a gratuity. It is true that there was an obiter dictum when the question first reached this Court in which the word "gratuity" is used, but at that time the Court did not consider the Act of October 5, 1918 as it did on the second appeal, nor had the Act of February 13, 1929 been passed. This Court did, when holding that interest paid and obligations to pay interest were allowable items (*284 U. S. 237*), cite *United States v. New York*, in which case this Court said:

> "It would be a reflection upon the patriotic motives of Congress if we did not place a liberal interpretation upon those Acts, and give effect to what, we are not permitted to doubt, was intended by their passage."

It was also there said:

> "Liberally interpreted, it is clear that the Acts * * * created on the part of the United States an obligation to indemnify the states of any costs, charges, and expenses properly *incurred* for the purposes expressed in the Act of 1861, the title of which shows that its object was 'to indemnify the states for expenses *incurred* by them in defense of the United States.'"[2] (Emphasis supplied).

---

[2]Cases showing respondent's right to "just compensation" and a "liberal interpretation" of these statutes are: United States v. New York, 160 U. S. 598; Stewart v. Kahn, 78 U. S. 11 Wall. 493, 504; Monongahela Navigation Company v. United States, 148 U. S. 312, 326; and Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299.

The argument used in the petition that "suffered" means that obligations incurred must have already accrued on the 2nd of March 1919 would utterly destroy any meaning of the words "obligations incurred" because the meaning which petitioner seeks to apply to the Act of 1919 would be sufficiently covered by the word "paid."

SUMMARY AND CONCLUSION.

Respondent for more than a decade has contended that interest paid and obligations to pay further interest constitute an allowable item of losses. Petitioner took issue with that contention but at no time claimed that the issue was not the same whether the interest was paid or obligated to be paid. As one of the facts not then of record but relied on by petitioner in his former application to this Court for the writ of certiorari it was said that the *obligations to pay* would greatly increase the amount involved. When the decree now sought to be enforced was agreed on, petitioner readily consented that interest obligations should be stated in the same sentence as interest paid. Thus the issue was tendered by respondent, accepted by petitioner and adjudicated by all the courts through which this proceeding dragged. This we believe was the only logical and fair course for respondent, but having relied on that issue, having litigated it for years, it cannot now be said that it is either logical or fair to claim that the law differentiates between obligations "paid" and obligations "incurred" which are to be paid. Those obligations paid and those unpaid were "incurred" to a large extent in the same contract. Why use "obligations" in the statute? If petitioner were right that only what was "paid" up to March 2, 1919 is included, the word "paid" alone would have met the situation and "*obligations incurred*" was mere surplusage. But the canons of construction do not permit the striking of the words from the legislative mandate.

The statute does not, petitioner did not, and logically and fairly cannot claim that "obligations incurred" can be otherwise limited than by the particular obligation that was incurred. When and only when net losses resulting from such obligations have been equitably adjusted and paid will the petitioner have complied with the statute, the decision of

this Court and the decree of the trial court. These petitioner has refused to obey and without further delay respondent is entitled to an appropriate writ compelling such obedience.

Respectfully submitted,

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APPENDIX.

Act October 5, 1918.

"An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The Essential Substance of the Act.

The Act is printed 40 Stat. 1009, and following. In Section 1 thereof it is stated:

> "By reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of the following-named mineral substances and ores, minerals, intermediate metallurgical products, metals, alloys, and chemical compounds thereof, to-wit: * * * pyrites * * * as the President may, from time to time, determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessaries."

Section 2 authorized the President to purchase such necessaries and to enter into contracts for the production thereof. The section further makes certain provisions for the cost price, which shall be at a price not "less than the purchase or cost of production thereof."

Section 3 authorized the President to take over mines producing the named minerals, and provided:

> "The United States shall make just compensation, determined by the President, for the taking over, use, occupation or operation by the Government of any such necessaries or any such land, deposit, mine, smelter, or plant, or part thereof."

This section also provided that if the just compensation to which the owner was entitled could not be agreed upon with the President, suit therefor or for a part thereof was authorized.

Sections 4 and 5 relate to administrative matters not material here.

Section 6 appropriates the sum of $50,000,000 to "be used as revolving fund for carrying out the objects of this Act, and for the purpose of making all payments and disbursements, including *just compensation* under section three."

Sections 7, 8 and 9 refer to administrative acts and are not material here.

Section 10 provides for a determination of the operative force of the Act, which was upon the proclamation of peace by the President.

Sections 11 and 12 are not material to the issue here.

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versus

UNITED STATES OF AMERICA EX REL. CHESTATEE PYRITES & CHEMICAL CORPORATION, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT.

BY

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NO. 767

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, Petitioner,

versus

UNITED STATES OF AMERICA EX REL. CHESTATEE PYRITES & CHEMICAL CORPORATION, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT.

THE OPINIONS BELOW AND JURISDICTION.

Petitioner correctly cites the opinions below and jurisdiction exists.

QUESTION PRESENTED.

Petitioner states the question here presented is the construction of the opinion of this Court and of the decree of the Supreme Court of the District although he also discusses the meaning of the statutes. Perhaps this is a proper limitation. The record definitely shows that the issue here was heretofore presented to this Court and construing the opinion of this Court and the decree of the Supreme Court of the District in the light of the issues involved it is respondent's contention that the issue now presented has already been

decided by this Court and adjudicated by the trial court. However, as respondent sees no difference between that decree and the opinion of this Court and the statutes, we shall discuss the issue in the light of the statutes.

THE SOLE ISSUE HERE PRESENTED.

The legal question here presented stated disjunctively is whether losses for interest on obligations incurred before November 11, 1918, can be compensated where the interest on such obligations accrued after March 2, 1919, or is there a legal cut-off on interest losses even though they arose out of binding contracts to pay interest made before the Armistice?

THE STATUTES INVOLVED.

Petitioner correctly sets out some of the statutes applicable to the issue here again presented. However, other statutes are involved. The Act of October 5, 1918, is not referred to by petitioner although it was considered by this Court in *Wilbur v. United States*, *284 U. S. 231, 237*, as being material to the issue presented. That act is 40 Stat. 1009 and the pertinent provisions are quoted in Appendix A hereto. The Act of 1918 provided for "just compensation" and was supplemented, not repealed, by the Act of March 2, 1919.

In view of some of the argument made by petitioner herein, the Act of June 7, 1924, is material and a copy of that act is shown as Appendix B hereto.

SUMMARY OF THIS REPLY BRIEF.

Petitioner, beginning at page 9 of his brief, summarizes his argument by stating three contentions. The first of these is the contention that the petitioner "has found as a matter of fact that relator is not entitled in justice and equity to any further allowance for interest." There is no basis of fact upon which to found this argument and in the statement of the errors and inadequacies of petitioner hereinafter, we are giving fully the facts.

The second contention of petitioner shown at page 10 of his brief involves a construction of the statute, the decision of this

Court and the decree of the trial court. Hereinafter we shall seek to show that this Court has already decided the question in favor of respondent and even if the particular question here involved had not been decided, the statute with which this Court's opinion agrees, requires an allowance for obligations incurred as well as an allowance for expenditures paid.

The third contention urged by petitioner beginning at the bottom of page 10 of his brief, presents a question of accounting not here involved but left under the statute for the consideration of the Secretary of the Interior. We shall discuss this question of accounting insofar only as is necessary to show that the question is one for the Secretary and that it is a question upon which he has already acted in favor of respondent.

The accounting method set up by the Department for determining the respondent's losses, due to its yielding to Government stimulation, is shown by Exhibit "D" to the original answer (R. 11 ff.) In this exhibit the Assistant War Minerals Commissioner deals with the whole problem and his findings have been consistently adhered to by the then Secretary of the Interior and his successors. This method of accounting was:

It recognized that the respondent corporation was brought into existence solely to comply with the Government's insistence that these war minerals be produced. All of its operations up to the Armistice were for this purpose alone, and its operations since the Armistice were merely an effort to liquidate the enterprise. Hence all of the expenditures of the corporation during its life were stimulated expenditures. Its interest bearing loans were stimulated, being expressly negotiated by the personal representative of the Secretary of the Interior. (R. 17).

The Department therefore treated all expenditures for this purpose and then deducted from the total all receipts and salvage. It, however, did not allow the full amount of the difference, not because it questioned the fact that the difference was a total loss to the claimant, but because the Department conceived that as a matter of law some of these losses could

not be allowed. These legal contentions have since been denied by the courts and the deducted items reinstated.

There now remains only the question of interest accruing after March 2, 1919, on obligations incurred before that date and within the stimulation period.

The fact that the Department disallowed various items which it found to be losses explains the statement made in conclusion by the Assistant War Minerals Commissioner (R. 24), "that claimant, in responding to Government request, will suffer great financial loss notwithstanding the generous provisions of the War Minerals Relief Act."

During all the delay (called in petitioner's brief 27, tortuous and prolonged) that incurred in securing by claimant the amounts which it is now established were its actual losses in responding to Government stimulation, interest was, of course, continuing on the obligations of the claimant.

The present method of accounting from which Exhibit "C" to this brief resulted is to credit all payments which have been made to the claimant against the total of its losses, crediting the same first against interest and then against principal and accruing interest only on the unpaid balances. It is difficult to see how there could be any serious question as to the correctness of this method of accounting; but if there were, that question is for determination by petitioner and Courts are not empowered to determine the method of accounting at this time. The issue here is whether the Secretary has acted correctly as a matter of law in establishing an ironclad cut-off as of March 2, 1919.

Practically all of respondent's losses grew out of loans for which the Government had induced it to incur obligations. These loans generally did not mature until long after March 2, 1919, and for the reasons definitely shown of record when they matured claimant was not and has never been in a position to pay them in full. Claimant's contracts to pay loans with interest constitute, as stated, the major portion of its losses. The principal of these notes was no more payable March 2, 1919, than was the interest then payable. Petitioner herein recognizes, as he is obliged now to recognize, that the loss in-

volved in the principal of these notes is a loss for which compensation is to be made, but the interest which was contracted for by the same instrument, payable at the same time, and which, together with the principal, constituted the aggregate obligations incurred, is according to petitioner to be separated and placed in a different category and no compensation paid for its loss.

The distinction is artificial and unreasonable. The "obligations incurred," for which the statute provided compensation, include the obligation to pay interest as well as the obligation to pay principal, both resulting from the same obligations. Each dollar's loss on one is just as much a loss to the claimant as a dollar lost on the other. The attempted distinction is not only without basis in the language of the act, but is founded on an unrealistic view of the situation and a disregard of the purpose which the statute was intended to fulfill.

PETITIONER'S BRIEF FAILS ACCURATELY OR ADEQUATELY TO STATE THE FACTS.

It would unduly lengthen this brief were respondent to discuss each error of statement and each failure to make a full statement. This brief therefore will be limited to the larger errors in these respects.

Throughout the brief of petitioner, there is the claim that respondent's right to recover interest paid or accruing after March 2, 1919, was not heretofore considered by the courts.

The first opinion rendered in this case was by the Supreme Court of the District of Columbia on July 27, 1923. In that case, subsequently appealed to this Court and reported as *Work v. Chestatee Pyrites & Chemical Corporation*, 267 *U. S. 185*, this respondent sought to obtain a writ of mandamus to compel the Secretary of the Interior to consider losses "from the expenditures made of interest in the amount of $40,795.13" and for "obligations incurred to pay interest" (see paragraph 11 and prayer in the case named). In that case, as shown in the transcript of the record therein, the trial judge, on January 9, 1924, sustained a demurrer to the answer

of petitioner's predecessor, Mr. Secretary Work, and granted the petition for the writ of mandamus. In the trial court's opinion in that case, the companion case just decided by that court was cited, as well as *Seaboard Air Line Rd. Co. v. United States*, *261 U. S. 299* and *United States v. New York*, *160 U. S. 598*. On appeal of that case to the Court of Appeals (see *Work v. United States*, *298 Fed. 839*), that court, at page 842, said:

> "Being, therefore, an element of the expenses incurred, we think that in equity and justice the interest paid or *obligated to be paid* in this case should be allowed." (Emphasis supplied.)

This opinion in 298 Fed. 839 was followed by the Court of Appeals in *Chestatee v. Wilbur*, *47 Fed. (2d) 424*, where it was stated:

> "The sole question presented is whether interest paid or *agreed to be paid* by the relator on borrowed money expended in producing or preparing to produce pyrites constitutes a loss which, by the terms of that Act, the Secretary should recognize and pay."

The latter decision was affirmed by this Court and in rendering its decision, *284 U. S. 231*, *237*, *238*, referring to interest *paid* or *incurred*, it said that such interest

> "* * * constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended."

Further to demonstrate respondent's contention that this question has already been decided by this Court in favor of respondent, we deem it necessary briefly to set out certain history material to a full understanding of the situation.

DEPARTMENTAL AND JUDICIAL HISTORY OF THIS CLAIM.

A. The Departmental History.

Respondent here, on March 5, 1919, filed its claim in the Department of the Interior, seeking an award of net losses (R. 3, admitted R. 27). This was the first claim filed and on June 5, 1919, a small award was made which on August 8, 1919, was increased and on October 15, 1919, further increased (R. 9–11).

Congress, on November 23, 1921, passed an Act amending the act of March 2, 1919. Under this amended act, further hearings were had before the Secretary of the Interior and his Assistant Commissioner and that Commissioner, on September 22, 1892, recommended an additional award of $469,784.62 (R. 11–24). This recommendation was adopted (R. 25).

In the opinion of Mr. Briar, the Assistant Commissioner, on which the award was made, he said:

> "All interest charges have been deducted"

and he proceeded thence to argue as a legal issue why no interest charges should be paid (R. 13–15).

In December of 1927, the Secretary of the Interior requested an opinion from the Attorney General on two questions, the second of which in the language of the Attorney General reads:

> "Second. Are you authorized to adjust, liquidate and pay net losses arising by reason of interest paid, or *payable under obligations to pay*, on money borrowed for use by operators in connection with operations under the law?" (Emphasis supplied.)

The Honorable The Attorney General gave an opinion on March 23, 1928, without expressing definitely his views as

to the law; but, because of the consistently-adhered-to policy of the Department of the Interior and of the grave question of one Secretary overruling a predecessor, advised the Department of the Interior not to pay "interest paid or *payable under obligations to pay*" without further legislation (35 Op. A. G. 426, 430, Emphasis supplied.)

Eight days after the decision of this Court, petitioner's counsel prepared a decree, which was somewhat modified by respondent's counsel (R. 40, decree printed R. 35, 36), in which it was decreed that the petitioner should "forthwith proceed to ascertain the amount of interest that at the time of the passage of the Act of Congress of March 2, 1919, had been paid or *the obligation incurred* by relator (respondent here) for money borrowed and lost * * * " (Emphasis supplied). Upon the service of that decree, petitioner sent out a new questionnaire asking certain questions, among which were questions 23 and 24, the first being a request to state the "amount of your claim for interest actually paid;" the second being "What is the amount of your claim for *interest still to be paid?*" (R. 40, Emphasis supplied.)

Thereafter, the Department of the Interior asked for opinions from its Solicitor, whose opinion is dated February 3, 1932 (R. 52), and from the Attorney General, whose opinion is dated April 2, 1932 (R. 57).

On March 16, 1932, the Secretary made another award to respondent in the sum of $44,451.45 for interest *accrued* to March 2, 1919, this being without "prejudice" (R. 85). This ends the activities of the petitioner in this case except as to the answer filed herein on April 27, 1932, and which will be discussed under the Judicial History (R. 45 ff.), as will also be the testimony of the AssistantSecretary (R. 82 ff.)

B. The Judicial History.

After the Act of 1921 and after further awards had been made to respondent and others, respondent sought a determination of the question here involved and in 1923 filed a suit in the Supreme Court of the District of Columbia seeking a writ of mandamus under allegations similar to those in this

case. In that case, the Supreme Court of the District, on January 9, 1924, held that the writ should be granted and cited in support of its opinion *Seaboard Air Line R. Co. v. United States, 261 U. S. 299* and *United States v. State of New York, 160 U. S. 598.*

After the decision of the Supreme Court of the District which was affirmed by the Court of Appeals of the District, Congress on June 7, 1924 (Appendix B hereto), while those decisions remained unreversed, restored the appropriation of $50,000,000.00. This case finally reached this Court and it was held that as the law then stood, the Secretary of the Interior had an uncontrolled discretion and the case was ordered dismissed for lack of jurisdiction. The Supreme Court, in dicta and where consideration of the act of October 5, 1918, was unnecessary, referred to "a gratuity" (*Work v. Chestatee Co., 267 U. S. 185*).

After this decision of the Supreme Court, Congress evidenced its determination to protect claimants in their right to "just compensation" by specifically granting jurisdiction to the courts (Act of February 13, 1929. For a history of the legislation see Appendix to brief for respondent in *Docket No. 67, October Term 1931, Wilbur v. U. S. ex rel. Chestatee Pyrites & Chemical Corporation*, reported in *284 U. S. 237*).

Congress having recognized respondent's rights, by this act removed any argument of a gratuity and specifically authorized the courts to grant relief for errors of law. Following that statute, and on the 18th of February, 1929, this suit was filed, in which it was alleged that respondent "claimed interest paid by it and due to be paid by it" (R. 3); that other amounts of interest "have since accrued and are yet accruing" (R. 4); that it was obligated "to pay further interest" (R. 5); and it prayed that the court direct the Secretary to make an award for what is "due for interest paid on borrowed money and for obligations to pay interest thereon" (R. 6).

In answer to this petition, petitioner set up the findings of his Assistant Commissioner hereinbefore referred to, admitted that respondent had paid interest and obligated itself to pay money in the future (R. 28); said that one of the questions of law was:

"(1) Is interest paid and *obligations to pay future interest* for the use of money a loss?" (R. 30, Emphasis supplied);

denied that respondent had suffered loss because of having paid interest and obligated itself to pay other interest.

This case was thereafter heard, appealed to the Court of Appeals and reached this Court where it was held (*284 U. S. 237*) that respondent was entitled to a writ of mandamus. Petitioner's counsel then drew a decree which was entered on December 15, 1931 (R. 35, 40), and after that decree had been entered, petitioner having failed to comply fully therewith, this petition was brought to enforce the decree. The word "decree" was used in the record, although the case is not an equity case, because the Act of February 13, 1929, makes "decree" and "judgment" synonymous.

In the petition to enforce the decree (R. 36 ff.), the history of the litigation is in part pleaded and it there definitely appears that respondent claimed not only interest that it had paid but interest that it was to pay in the future; that this claim was recognized and indeed, that petitioner, in seeking the former writ of certiorari, had, as one of the grounds to show public interest, stated to this Court:

> "The amount claimed for interest would be increased and possibly more than doubled if computed to the date of settlement of the claim" (petition for writ of certiorari in the former appeal, p. 11).

The record here (pp. 37–40 inclusive) shows definitely that the issue included: (a) interest paid; and (b) future interest obligated to be paid. The issue was so prominent and so painfully evident that the learned Attorney General who in one place in his opinion said it was "lurking in the record" but with colloquial forcefulness and more frankness said elsewhere in his opinion that "it stuck out like a sore thumb" (R. 61). Notwithstanding his awareness of the issue, no claim was made that there was any division of the issue.

Respondent's counsel did not then believe and do not now believe that there is any difference in the legal obligation as to the interest paid and the obligations to pay further interest.

Apparently petitioner's counsel agreed with respondent's contention and the issue was treated as one and not as two. Either petitioner's counsel then saw no legal distinction between interest paid and interest to be paid or he failed adequately to inform the court of his contentions. No one argued that there was any difference in law as to the subdivisions. The sole argument made by the petitioner at that time and at all times prior to the filing of his answer herein, was that no interest paid or obligated to be paid could be recovered. The argument of respondent's counsel was that all interest, that paid and that obligated to be paid, could be recovered. The word "obligations" is in the statute and was used in the opinion of this Court, in the decree of the lower court of December 15, 1931, and throughout the pleadings. The Secretary seemed to agree with his counsel and with the approval of his counsel sought to obtain information both as to interest paid and as to interest still to be paid (R. 40).

ERRORS AND INADEQUACIES IN PETITIONER'S BRIEF HEREIN.

Petitioner, page 4 of his brief, admits that respondent, in its petition herein, presented the issue of "interest paid on borrowed money and obligations incurred to pay interest thereon" and further admits that the Court of Appeals in the former appeal of this case, said: "Interest paid or obligated to be paid in this case should be allowed" (see petitioner's brief herein, p. 5). Petitioner follows these admissions with the statement (see his brief, p. 5).

> "Nothing in the briefs of either party filed in this Court specifically raised or called to the attention of this Court the question whether interest paid and accruing after March 2, 1919, was allowable."

It is submitted that while the argument does not occur in a brief, that the statement in the petition for certiorari in the former appeal in this case and respondent's pleadings, statements of issues and the opinions of the courts, do definitely present the issue which petitioner now claims was not called to the attention of the court. The statement in the application for certiorari in the former appeal herein, *Docket 67*,

October Term 1930, at pages 10 and 11, does show that reliance was had on the fact that interest was continuing to run and the Solicitor quoted from a letter from the Department of the Interior a statement reading:

> "The amount claimed for interest would be increased and possibly more than doubled if computed to date of settlement of the claim."

As already stated, counsel for respondent did not see any difference in law between the two classes of losses, one for interest paid and the other for obligations to pay further interest. When petitioner's counsel presented the fact that interest was continuing to run as a basis for obtaining the writ of certiorari and did not present any differentiation between the two subdivisions of losses, it was unnecessary for counsel for respondent to insist that counsel for petitioner should make an issue of this difference. If there had been any legal distinction between the two items of interest, petitioner's counsel should have so claimed.

Petitioner calls attention to the fact that he waived the issuance of a formal writ of mandamus but seems to think it necessary, notwithstanding that waiver, to claim that a formal writ of mandamus was not issued (see petitioner's brief, p. 6). Petitioner's immediate predecessor admitted the receipt of the decree of the court and his counsel agreed to act upon such decree (see R. 85, 86). See note 3 of petitioner at the bottom of page 6 of his brief is wholly irrelevant and immaterial.

THE ISSUE HERE IS ONE OF LAW.

Beginning at the bottom of page 12 of his brief herein and continuing through the greater part of page 13, petitioner sets up his response in the trial court and relies upon the claim that by making an award, without prejudice, of some forty odd thousand dollars, he had determined as a matter of fact what was just and equitable. While none of the assignments of error seems to us to include this contention and while we are greatly surprised that the contention, in view of the facts, should be made as it has been made, some brief reference to the facts is necessary.

It is true that the immediate predecessor of petitioner here filed a response setting up the language quoted in the petition herein. Respondent had filed a detailed petition setting up the facts. Petitioner (See record beginning at page 45) responded by setting up some arguments and a technical contention about writs of mandamus which had no relation whatever to the issue then pending and without denying any of the allegations of fact in respondent's petition, broadly claimed that he had acted as a matter of fact and decided against petitioner. That claim was not pressed in the Court of Appeals and out of kindness to petitioner's counsel, was not seriously considered in the opinion therein, but was dismissed with the statement:

> "We are not impressed with the contention that the ruling of the Secretary amounted merely to the determination of an issue of fact." (R. 96).

The response, or answer, referred to by petitioner at pages 12 and 13 of his brief, was traversed by respondent. Of course the response does not prove itself, the original petition of respondent was not denied and possibly testimony was unnecessary but respondent deemed it proper that the facts should be presented to the Court and after the Assistant Secretary had signed the response, placed that official on the stand and he categorically denied all the substantial allegations in the response (R. 82–85).

Petitioner here cites the case of *West v. Hitchcock, 205 U. S. 80*, on which he relied in the trial court and the trial judge himself cited that case. The true rule in a case like this is that stated in *United States v. Fisher, 222 U. S. 204, 209* and *Ex parte Newman, 14 Wall. 152, 166.*

In *Ex parte Newman, above*, the Supreme Court, beginning at page 166, discussed the practice with reference to proceedings for mandamus and it is there said in substance, that where the respondent to the rule alleges matters in avoidance of the charge made and where such matters are denied by the relator, they must be proved by the respondent. Here, respondent below, petitioner here, did not specifically deny the allegations of fact of the relator, respondent here, but did take issue on the law and state matters in avoidance which

might be construed as in conflict with the allegations of relator. Not only did petitioner here fail to offer proof of his response below, but that response was definitely disproved.

The answer claimed that consideration had been given to all interest due regardless of any cut-off. The witness testified: "I did not consider any interest beyond March 2, 1919" (R. 83); and further, the witness said that he had dealt with the question solely as a matter of law, made a payment without prejudice and while awaiting the opinion of the Attorney General (R. 84, 85).

The answer in this case was much less carefully prepared than the answer criticised by this Court in its decision of January 16, 1933, in *Wilbur v. United States*, where the answer, as is true here, did not disclose to the court all relevant facts and circumstances. Just how petitioner's counsel, with these facts before them, can use the argument they do use at the bottom of page 13 and top of page 14 of petitioner's brief is difficult to explain.

THE OBLIGATIONS, THE BASES OF THE NET LOSSES SUFFERED, WERE INCURRED UNDER THE INFLUENCE OF THE SECRETARY OF THE INTERIOR.

At page 18 of petitioner's brief herein, he says:

> "But claimants, under the statute, did not undertake their mining operations wholly from patriotic motives. Even when 'stimulated' by Government officials, they did not proceed entirely without hope of profit, and under conditions existing at the time they were warranted in anticipating profits."

This statement probably would not have been made had petitioner's answer "been more carefully prepared with purpose to disclose to the court all relevant facts and circumstances."

When the Congress was investigating the Department of the Interior with reference to respondent's claim and the claims of others, extensive hearings were had in response to H. J. Res. 170. These hearings are designated "Hearings Before The Committee On Mines and Mining, House Of Representatives,

Sixty-Sixth Congress, Second Session." A copy of those hearings was, at the request of the late Chief Justice Taft, filed in the case reported in *267 U. S. 185*. In the course of the hearings, George L. Pratt, Treasurer of respondent, was called upon to testify. His testimony begins at page 17 of the record on that hearing. It there appeared that on May 21, 1917, the Honorable Franklin K. Lane, Secretary of the Interior, wrote a letter to a friend urging him to look into the question of the amount of ore belonging to Chestatee Pyrites & Chemical Corporation (see page 20 and page 21 of those hearings). Mr. Lane had himself testified before Congress and this is copied at page 24 of these hearings. There he described how he had induced his friend to develop mines in the South and he said anybody could do the same thing "provided that the man who develops the small deposit in the United States can be assured that he will *get his money* out of the investment that he puts into the development of these mines." The gentleman to whom Mr. Lane referred and who had developed the mines was Mr. Fuller E. Callaway. After Mr. Lane, on May 21st, had requested Mr. Callaway to investigate respondent's mine, he did so and on June 18, 1917, Mr. George L. Pratt, Treasurer of respondent, at the request of Mr. Callaway, wrote a memorandum of the situation (see pp. 24–27). From this letter it appears that respondent had a small mine, financed to a limited extent and Mr. Pratt said:

> "The owners have not felt justified in development and exploitation of the Chestatee property beyond the extent above outlined even though the present pyrites situation would seem to warrant quick deliveries of heavier tonnages."

He followed this by a statement of the things that were necessary for the Government to do, the fifth of these being:

> "Underwrite in some way the hazard or mining risk which now seems warranted on account of the urgent necessity of heavy tonnage of ore, but which would not seem to be justified under sound conservative business principles in normal times."

It may be that respondent was not "without hope of profit," but it certainly is true that no profit motive induced respondent

to surrender its small, and as the record in petitioner's office shows, profitable enterprise, to embark on a large and dangerous enterprise. Patriotism, not profit, was the moving cause.

The findings of the Department of the Interior in this case, which were placed in the record at the time that Department was "commendably" (See this Court's opinion of January 16, 1933, in *Wilbur v. United States*) cooperating in an effort to present the legal question involved, shows definitely that the excerpt from petitioner's brief quoted above, p. 16 is wholly unjustified. These findings appear at Record, pp. 11–24. There it appears that it was impossible by ordinary means to secure the amount of money required to meet the Government demands; that in this situation, the Government actively induced capitalists with sufficient money to finance respondent to the end that the war needs might be quickly and in large measure met; that these efforts of the Secretary of the Interior were personal, direct and effective; that the Secretary thus became active because he realized that respondent's property presented opportunity for the biggest production of pyrites in the entire country. The Secretary did not and could not guarantee against loss, he did use "his full influence short of underwriting the project" and he did this "always" with a "realization that claimant (respondent), in responding to Government request, will suffer great financial loss."

INTEREST BEYOND MARCH 2, 1919, HAS BEEN CALCULATED BY PETITIONER.

At page 23, petitioner says:

> "Apparently no accurate computation of interest beyond March 2, 1919, has been made by the Secretary."

As petitioner himself sets up letters and findings of his predecessor not of record herein, respondent is justified in using a statement of petitioner's predecessor. Therefore we attach hereto as Appendix "C" a letter from the predecessor of petitioner showing that he has made an accurate computation of interest beyond March 2, 1919.

NO FINAL AWARD HAS BEEN MADE.

At the bottom of page 23 of petitioner's brief, he says:

> "* * * on February 23, 1933, a *final award* of $90,500 was made." (Emphasis supplied).

While this statement is modified by saying that the award was made in pursuance of the decision of this Court of January 16, 1933, the use of the words "final award" is misleading. It was a final award in that case but in order not to misapprehend the exact application of the statement quoted above, the award itself should be looked to. At page 39 of petitioner's brief, the Secretary of the Interior, speaking of this allowance of $90,500.00, specifically says that it was "up to March 2, 1919," and the acceptance of this award shown at page 40 of petitioner's brief, was specifically limited to "March 2, 1919." The Assistant Secretary of the Interior testified:

> "It has been decided that interest ends March 2, 1919, and if we are in error in our law, we will at once make the calculation in accordance with the law." (R. 84).

THE AMOUNT OF THE AWARD DUE RESPONDENT IS FOR DETERMINATION BY THE SECRETARY OF THE INTERIOR.

At page 24 of petitioner's brief he quotes correctly from the respondent's statement of its interest bearing obligations which respondent said totalled $860,087.96. As the amount of the obligations for interest paid is a question of fact for the Secretary and the Secretary has made his findings of fact as shown in Appendix "C" attached hereto, it is not an issue before the Court as to the amount of the award that relator is entitled to. All relator is here asking is that the Secretary award as the undisputed facts require, the amount that is justly due it for obligations incurred to pay interest beyond March 2, 1919. As petitioner's figures are somewhat confusing, it may be necessary to call attention to the fact that had petitioner's predecessor prepared his response to the petition herein to enforce the opinion of this Court and the decree of the Supreme Court of the District "with purpose to disclose to the Court all relevant facts and circumstances," there would

have been presented here no difficulties. However, merely to show that there is a substantial amount due respondent, we call attention to a few figures definitely of record.

In the findings originally made herein, the "auditor for the Government and the auditor for claimant" agreed that there had been expended from June 18, 1917, to November 11, 1918, $784,791.14. This Court held on January 16, 1933, in *Wilbur v. United States, Docket 335*, that expenditures made prior to June 18, 1917, for property purchased thereafter by respondent were allowable items. In accordance with that decision and in the exercise of his discretion, the Secretary made an award of $90,500.00. As shown on page 23 of the record in this case, items outside of the expenditures included in the item of $784,791.14 totalling $114,774.56 were allowed. Adding the item of $784,791.14, the award of $90,500.00 and the losses formerly accepted as allowable of $114,774.56, there is a total of $990,065.70. In this total the only interest item is that interest which was paid prior to March 2, 1919. Crediting the Government as should be done with all payments made and calculating interest as we insist should be done, after crediting these partial payments, there is a large amount of obligations incurred for interest as shown by the findings of the Secretary (Appendix C). Taking the unpaid principal and the interest obligations incurred, it will be seen that justly and equitably and under undisputed facts and figures, respondent is entitled to be paid an additional award but as heretofore said, we see no reason why petitioner should have injected this question of amount into the case and the only reason we answer it is because we want definitely to show that there is a large amount involved and that the Government has not yet paid respondent all its net losses.

In subdivision 3 of petitioner's argument, page 21, he discusses a proposition which seemingly is to the effect that interest should be allowed only for that which is paid or that which was incurred. That is all respondent asks for. The quotation from the trial judge's opinion on page 22 does not correctly represent the full facts and brings up again the proposition that this Court is not considering facts but is only determining the law. The Secretary of the Interior, Appendix C hereto, has found the facts. It is true that com-

plying with a questionnaire sent out by petitioner's predecessor respondent stated how much it had paid by way of attorneys' fees and other expenses. The assumption then was, and we still believe that was the intention of the Secretary of the Interior at that time, that because respondent had had to pay out large sums in expenses and attorneys' fees, that fact should be given consideration in determining what was just and equitable. Unquestionably respondent, when it paid its attorneys' fees and expenses, could not charge those to the Government and unquestionably respondent should credit the Government for all receipts obtained, and whether those receipts were used by respondent to pay obligations or not, they stopped the obligations pro tanto. Respondent never has contended otherwise and as aforesaid, merely presented the facts at the request of petitioner. What petitioner's predecessor has done in Exhibit C hereto is to credit on the obligations all the money that respondent has received from the Government, paying as the law requires, interest first and crediting the remainder on the principal. With these partial payments made, interest paid and credits allowed, there is yet due respondent the sum found by the Secretary to which subsequent interest obligations are to be added, but that amount is not at all material here.

ARGUMENT AND AUTHORITIES.

The Legal Issue Involved.

In describing the method to be adopted by the Secretary of the Interior in arriving at that "just compensation" provided for in the Act of 1918 (respondent's brief, Appendix A) and carried forward in the Act of 1919 (petitioner's brief, Appendix A), there are used words as follows:

> "Expenditures so made or obligations so incurred."

These words limit the rights of respondent and state the duty of the Secretary. It is not denied but is definitely admitted, that respondent incurred obligations, suffered losses therefrom and all its net losses have not yet been paid. Bringing the legal question down to its lowest terms, there is here involved nothing but the meaning of the words "obligations incurred."

Respondent borrowed money and gave notes therefor. It bought machinery on credit and gave notes for the purchase price. It bought equipment on account and obligated itself to pay those accounts and under the statute of Georgia, such accounts bear interest at 7% per annum. The notes bear interest until maturity at 6% and after their maturity at 8%. (This says the Attorney General is lawful, record 65). There can be no doubt that these were obligations and they were incurred but petitioner says they had not accrued prior to March 2, 1919, and that that statute limits obligations to obligations accrued. In effect, what petitioner is seeking to do is to amend the statute, amend the decision of this Court and amend the decree of the trial court by striking from each the word "incurred" and inserting in lieu thereof the word "accrued."

The Issue Has Already Been Decided By This Court.

Strictly speaking, the question is a construction of the judgment and decree of December 15, 1931, heretofore rendered in the trial court and from which no appeal was taken.

This Court, when this case was here the second time (*284 U. S. 231, 237*), cited and relied upon the Act of October 5, 1918, which authorizes a recovery by respondent here of just compensation for its losses and said:

> "The amount of interest that at the time of the passage of the Relief Act March 2, 1919, had been paid or incurred by relator for money borrowed and lost in producing and preparing to produce pyrites upon the specified conditions is to be taken into account in determining the amount of its net loss as of that date. It constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended. *United States v. New York, 160 U. S. 598, 621–624.*"

Seemingly the use of the date March 2, 1919, in the above quotation is the basis of the argument of petitioner here. It is argued on behalf of the Department of the Interior that by the use of this date this Court intended to limit obligations *incurred* to those that had *accrued* on or before March

2, 1919. The Act of 1919 does not limit the right to recover to the losses that had actually been paid but included losses that might thereafter be paid on obligations incurred prior to November 11th and when this Court, in the quotation above, used the words "specified conditions" in referring to the Act of March 2, 1919, it merely wrote into the opinion the conditions of that Act and did not, of course, extend the time in which obligations could be incurred to March 2, 1919, nor did it limit to that date the time that obligations incurred might accrue. There is nothing in the decision of this Court that prevents a recovery of losses from obligations incurred within the specified conditions of the statute.

Petitioner, at page 20 of his brief, refers to the amendatory statute involved in the *New York case*. The Supreme Court did not give any emphasis to that statute in its opinion nor do we think that it has any application here. We do not contend that we are entitled to an allowance for obligations incurred after November 11, 1918. Our contention is that obligations incurred prior to that date, although accruing after March 2, 1919, are allowable items and there is nothing in the statute quoted that conflicts with that contention and it is our opinion that our contention has already been adopted by this Court.

The date the interest losses *accrued* is immaterial so long as the losses are the *result* of *obligations incurred* during the stimulation period.

In the opinion of this Court and following the quotation above, there is set out some of the "specified conditions" which must exist before interest paid or obligations incurred to pay interest are allowable items. These conditions, this record shows, were fully met by respondent.

The Statutes As Well As The Decision Of This Court Entitle Respondent To An Award For Its Losses From Obligations Incurred.

The present proceeding was inaugurated as a proceeding to require a compliance with the final judgment and decree of December 15, 1931, and the question might well be whether that judgment and decree authorized the Secretary to stop

his consideration of interest losses to that interest which had accrued before March 2, 1919. The judgment and decree certainly required the Secretary to adjust the claimant's interest losses generally, and if it did not authorize the Secretary to cut off these losses to accruals as of that date, then it would follow that he had not complied with the judgment and decree. We do not, although we might, place this case on any such narrow ground alone.

The judgment and decree was intended to force a compliance with the statute. It was not intended to give the claimant anything not given by the statute. We do not ask that it be construed as broadening respondent's rights under the statutes. We, therefore, look to the statutes to determine the meaning of this judgment and decree and do not insist that our rights go beyond the statutes.

Meaning of the Statute.

With this preliminary explanation of the nature of the question involved, we confidently assert that the meaning of the statute in this respect is this: It compensates claimants for losses paid on obligations incurred prior to its date. If the obligation out of which the loss arises was incurred before November 11, 1918, the subsequently maturing loss is within the compensation granted by Congress. Since it is settled that interest losses of claimants are losses within the meaning of the War Minerals Relief Statutes, then it follows that those interest losses must have been paid, or the obligation to pay the interest incurred before the date of the statute and during the stimulation period. But the actual accrual of the loss (which is another way of speaking of the accrual of the interest) need not have occurred before the date of the statute, *provided it arises out of obligations to pay interest which were incurred "upon the specified conditions" of the statute.* All of the claimant's losses do so arise.

Liberality Of Construction To Effectuate Relief Demanded.

Not infrequently in this and prior cases involving the same issue, counsel for petitioner and his predecessors have re-

ferred to the statutory provision containing the words "just and equitable." It has been the uniform holding of this Court in cases involving a statute having a purpose similar to the statute here, to interpret the statute liberally for the benefit of the claimant and in pursuance of what is the clear and laudible purpose of the Congress.

This principle is stated in *United States v. New York, 160 U. S. 590, 620; Stewart v. Kahn, 78 U. S. 11 Wall. 493, 504;* and *Monongahela v. United States, 148 U. S. 312, 326.*

In *Russell Motor Car Co. v. United States, 261 U. S. 514, 521, 522,* this Court had under consideration a statute having a similar purpose to the statute here involved, both that statute and this statute having as their purpose to protect those whose property was used during the World War. There this Court graphically describes the necessities of the Government during the Great War and as a result of the exigent condition said the principle to be applied was:

> "Not to provide, therefore, for the cessation of this production when the need for it had passed, would have been a distinct neglect of the public interest."

"Obligations So Incurred" In The Statute May Not Be Disregarded.

We have already disposed of the disingenuous contention that the Secretary has found "as a matter of fact that relator is not entitled in justice and equity to any further allowance for interest." Petitioner begins his argument (p. 11) by the contention that a loss on an obligation is not suffered until the obligation has accrued. If that were the proper construction of the statute, why use the word "obligations?" The word "paid" would have included everything that the petitioner now contends in his brief we are entitled to recover. The only interest that we have received is that interest which was paid prior to March 2, 1919. What, in effect, petitioner seeks to do is to destroy any meaning whatsoever of the word "incurred."

Obviously, respondent "suffered" a loss within the meaning of the Relief Act, as interpreted by this Court, when it in-

curred obligations to pay interest on the money it borrowed and lost.

Petitioner, at page 15 of his brief, says:

> "A claimant may have chosen to obligate himself to pay interest for twenty or thirty, or more, years in the future;"

Whether or not such a statement is legal and logical is wholly immaterial here. What we have here is that a claimant, the respondent in this case, was induced definitely and specifically by the Secretary of the Interior, to obligate itself to pay certain definite sums of money at prescribed times and this is the obligation that we insist the Government has contracted to meet. On the same page, a paragraph from the opinion of this Court is quoted but it will be noticed that in the quotation both the words "paid" and "incurred" are used. The argument we have already made shows that this Court need not have used the word "incurred" if it meant what the petitioner claims it means. We assume that the Court, in using the statutory word "incurred" had a purpose and that it was not inserted uselessly. The words "as of that date" used by the Court are followed in the same paragraph by the statement:

> "It (referring to interest paid or incurred) constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended. *United States v. New York, 160 U. S. 598, 621–624.*" (Parenthesis ours).

In the opinion of the Solicitor of the Department of the Interior herein, speaking of the opinion of this Court, it is said:

> "Literally read the Court's decision holds that the date of the passage of the relief act denotes the ultimate date to which interest may be computed as an allowable item of loss thereunder. That is the date upon which the responsibility of the Government terminated." (R. 54).

The learned Attorney General, after saying:

> "It is not to be wondered at therefore, that as the point was never argued before it the Supreme Court is not very explicit in its opinion" (R. 62),

quoted the same part of the paragraph of this Court's opinion quoted in the brief in this case and said:

> "Clearly, there is nothing in this to justify the conclusion that the court intended to hold that interest accrued after the passage of the Relief Act on obligations incurred before that date was allowable. On the contrary, the inference is that the court was guarding itself against any statement suggesting the inclusion of interest accrued after March 2, 1919." (R. 62).

Petitioner, in his plea herein, said:

> "There is no discussion in the opinion on the point now raised and there is nothing to show that the court reached a conclusion one way or another on the method of computation, or whether there should be a cut-off as of March 2, 1919, in computing the losses for interest paid or liability for payment of which had been incurred." (R. 59).

Notwithstanding the claim on the part of the learned Solicitor, the learned Attorney General and counsel who wrote petitioner's answer that there is an indefiniteness in the opinion of this Court, relator submits that the Court clearly stated that its conclusion was based "upon the specified conditions" of the Act of March 2, 1919, and it is submitted that the Court did not mean to extend rights to incur obligations from November 11, 1918, to March 2, 1919, which would be the inevitable logic of the contention of petitioner. Not only do we believe that our statement of the meaning of the opinion of this Court is the proper construction of the unambiguous language of this Court; it was the construction placed upon your decision by the Department of the Interior and the trial court.

Eight days after the decision of this Court, petitioner's counsel prepared a decree, which was somewhat modified by respondent's counsel (R. 40, decree printed R. 35, 36), in which it was decreed that the petitioner should "forthwith proceed to ascertain the amount of interest that at the time of the passage of the Act of Congress of March 2, 1919, had been paid or *the obligation incurred* by relator (respondent here) for money borrowed and lost * * * " (Emphasis supplied). Upon the service of that decree, petitioner sent out a new

questionnaire asking certain questions, among which were questions 23 and 24, the first being a request to state the "amount of your claim for interest actually paid;" the second being "what is the amount of your claim for *interest still to be paid?*" (R. 40, Emphasis supplied).

The argument used by petitioner drawn from the decision of this Court in *Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co., 284 U. S. 231*, is lacking in any logical or legal force. Loss for property purchased as was involved in that case, is not incurred until the property has become valueless or depreciated in value. Loss for an obligation to pay money in the future may be and here was determinable before the obligation was met and that is why, and the only legal reason why, Congress used the words "obligations incurred."

Petitioner cites *Burnett v. Huff, Decided Feb. 6, 1933; Lucas v. American Code Co., 280 U. S. 445;* and *Weiss v. Wiener, 279 U. S. 333.* There is in the facts involved in these cases nothing relevant to the issue here.

We cannot do better than to copy the argument of the Court of Appeals in this case. This argument in part reads:

> "It is urged that to allow interest on obligations that had been incurred but not paid at the date of the passage of the 1919 act would not constitute a final determination of 'the amount of its net loss as of that date.' We are not impressed with this contention. The amount of the principal sum being established as of that date, the interest payable thereon can be ascertained at the same time and readily computed at the time of final payment.
>
> "In the present case the principal sum was borrowed and lost and had not been paid on March 2, 1919, and was not then due. Relator, however, was under obligation to pay this principal sum, which is conceded to be a loss within the act, and he was likewise under obligation to pay the interest incurred in the creation of this obligation. In other words relator was as much obligated on that date to pay the interest as it was to pay the principal. The aggregate of the two items at time of payment by the

Government, constitute the net loss. If relator could not make claim for the interest because it was not payable at that time then by analogous reasoning relator could not be compensated for the principal debt, which was not due and payable at that time." (R. 97, 98).

"Obligations Incurred" Construed In Other Cases.

Under the national banking laws shareholders are liable upon insolvency to the extent of the face value of their stock "for the contracts, debts, and engagements of the bank." "Contracts, debts, and engagements" but describe "obligations incurred" and decisions under the banking laws defining these terms are in principle directly applicable here. In such decisions the authorities are uniform to the effect that the liability is commensurate with the obligations of the bank.

In *Richmond v. Irons, 121 U. S. 27, at page 64*, this Court said:

> "Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the *contracts, debts, and engagements* of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders *to the time of payment.*" (Emphasis supplied).

This language is directly applicable here and shows that for the "obligations" of respondent the Government agreed to pay "net losses" and it follows that the "obligations incurred" by respondent include interest as this Court has held and that

such interest runs "to the time of payment." This is, of course, not interest as such but the obligations to make good the losses. The stockholders' and the Government's obligations here were to pay losses.

Congress, By Act 1924, Supports Respondent's Contention.

It will be noted in the argument of petitioner on page 20 where he cites the *New York case*, that the word "incurred" is italicised. That is the word used here and this Court cited the *New York case* in support of its opinion in this case.

Some argument is made by petitioner on page 20 of his brief that disregards the history of the legislation now before the Court.

On January 9, 1924, the Supreme Court of the District of Columbia, in the opinion referred to ante, p. 4, held that interest paid and obligations to pay interest were properly allowable. The Secretary brought this holding to the attention of the Congress. This holding was sustained by the Court of Appeals (*Work v. United States, 298 Fed. 839*). Later the decision was reversed by this Court on the ground of lack of jurisdiction and while the opinions requiring a recognition of obligations to pay interest remained unreversed, the Act of June 7, 1924, Exhibit B hereto, was passed to meet the situation and the limitation of $8,500,000.00 on the appropriation contained in the Act of 1919 was stricken, leaving the original appropriation of $50,000,000.00 in force. So there is nothing in petitioner's argument that Congress has sought to cut off interest as of March 2, 1919. The amount of interest that respondent is now entitled to has increased. Indeed, petitioner himself, in his former application for certiorari herein, expressed the opinion that the interest amount might be doubled. That statement was approximately accurate. During the fourteen years that petitioner has refused to comply with the law, interest has increased and it has increased considerably in the four years since the Act of 1929 was passed.

On page 26 of his brief, petitioner, referring to a note at page 24, contends that payments made "it possible for the

respondent to discharge its interest bearing obligations in full." Here again petitioner relies upon a statement that was definitely disproved by the Assistant Secretary of the Interior and as to which no proof was offered by petitioner himself. The facts are stated by the Secretary himself in Exhibit "C" hereto and it there appears that crediting all payments made, first to interest and then to principal, there remains a large amount due respondent. Again we wish to call attention to the fact not only that the statement relied upon was definitely disproved, but that this raises an accounting question which the law leaves to the Secretary.

CONCLUSION.

The question here is are we to use the language of the statute and take obligations incurred and pay net losses therefor, or are we to change the statute and limit obligations incurred to those accrued on or before March 2, 1919?

It is submitted that the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A.

Act October 5, 1918.

"An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The Essential Substance of the Act.

The Act is printed 40 Stat. 1009, and following. In Section 1 thereof it is stated:

> "By reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of the following-named mineral substances and ores, minerals, intermediate metallurgical products, metals, alloys, and chemical compounds thereof, to-wit: * * * pyrites * * * as the President may, from time to time, determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessaries."

Section 2 authorized the President to purchase such necessaries and to enter into contracts for the production thereof. The section further makes certain provisions for the cost price, which shall be at a price not "less than the purchase or cost of production thereof."

Section 3 authorized the President to take over mines producing the named minerals, and provided:

> "The United States shall make just compensation, determined by the President, for the taking over, use, occupation or operation by the Government of any such

necessaries or any such land, deposit, mine, smelter, or plant, or part thereof."

This section also provided that if the just compensation to which the owner was entitled could not be agreed upon with the President, suit therefor or for a part thereof was authorized.

Sections 4 and 5 relate to administrative matters not material here.

Section 6 appropriates the sum of $50,000,000 to "be used as revolving fund for carrying out the objects of this Act, and for the purpose of making all payments and disbursements, including *just compensation* under section three."

Sections 7, 8 and 9 refer to administrative acts and are not material here.

Section 10 provides for a determination of the operative force of the Act, which was upon the proclamation of peace by the President.

Sections 11 and 12 are not material to the issue here.

APPENDIX B.

Act of June 7, 1924.

(Public—No. 249—68th Congress) (S. 2797).

An act to authorize the payment of claims under the provisions of the so-called war minerals relief act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the Secretary of the Interior to lawfully pay adjudicated claims arising under the provisions of the so-called war minerals act entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," approved March 2, 1919, as amended, the limitation in said act on the aggregate amount to be disbursed thereunder in the payment of said claims is hereby repealed.

APPENDIX C.

The Secretary of the Interior

Washington

February 25, 1933.

Mr. Lee Ashcraft,

President, Ashcraft & Wilkinson Co.,

Atlanta, Georgia.

My dear Mr. Ashcraft:

With the award of $90,500 made on February 24, 1933, in the war minerals claim of the Chestatee Pyrites and Chemical Corporation in its War Minerals Claim No. 1, complete settlement has been made for all claims of said company under the War Minerals Act, except the claim for interest from and after March 2, 1919, which is now on appeal in the Supreme Court of the United States from decision of the Court of Appeals of the District of Columbia. If the Supreme Court confirms without modification the decision of the Court of Appeals, the Department has calculated that the amount due in said claim would be $561,867 as of December 31, 1931, subject to errors or omissions in computation and to additions from the last date of calculation to date of final settlement.

Sincerely yours,

RAY LYMAN WILBUR,

Secretary.

NOTE—Ashcraft & Wilkinson Co. is the company Secretary Lane induced to lend the monies for which respondent incurred obligations.